

ARIZONA LEGISLATIVE COUNCIL

MEMO

March 13, 2019

TO: Senator Martin Quezada
FROM: Ken Behringer, General Counsel
RE: H.B. 2523; Proposition 105 (R-54-25)

BACKGROUND

House Bill 2523 would allow an employer to pay the federal minimum wage to persons who are under twenty-two years of age, employed on a casual basis and enrolled full-time as a student. Arizona Revised Statutes (A.R.S.) section 23-243 (as would be added by House Bill 2523.) Casual employment is either employment for not more than twenty hours per week or employment for more than twenty hours per week if the hours in excess of twenty hours "are without regularity or are for irregular or intermittent periods." A.R.S. section 23-230, paragraph 11 (as would be amended by House Bill 2523.)

The federal minimum wage is \$7.25 per hour, currently. 29 United States Code § 206. The minimum wage prescribed pursuant to A.R.S. section 23-363 for 2019 is \$11.00 per hour. A.R.S. section 23-363, subsection A, paragraph 3.

QUESTION

Is House Bill 2523 subject to Constitution of Arizona article IV, part 1, section 1(6) (Proposition 105)?

ANSWER

House Bill 2523 is subject to Proposition 105 because it would allow employers to pay certain employees wages at a rate lower than the rate prescribed in a voter approved statute.

DISCUSSION

At the 1998 general election, the voters approved Proposition 105, which prohibits the legislature from repealing a referendum or initiative measure. Ariz. Const. art. IV, pt. 1, section 1(6)(B). The legislature may amend a provision protected by Proposition 105 only if the amendment furthers the purposes of the provision and the change is approved by at least three-fourths of the members of each house of the legislature. *Id.*, section 1(6)(C).

At the 2006 general election, the voters approved Proposition 202, which added A.R.S. sections 23-362 and 23-363. At the 2016 general election, the voters approved Proposition 206, which amended A.R.S. section 23-363. Accordingly, legislative amendments to these sections are protected by Proposition 105. House Bill 2523 does not directly amend any of these statutory provisions. Therefore, Proposition 105 applies to House Bill 2523 only if the bill indirectly amends the provisions added by Proposition 202. *See State v. Maestas*, 244 Ariz. 9, 12-13, ¶¶13-18, 417 P.3d 774, 777-78 (2018).

In *Maestas*, the defendant challenged his conviction for possessing marijuana on a university campus because the statute that he violated was contrary to the Arizona Medical Marijuana Act (AMMA), which was enacted by the voters in 2010. *Id.* at 10-11, ¶¶1 and 3, 417 P.3d at 775-76.

The AMMA generally immunizes a person's AMMA-compliant possession or use of marijuana from "arrest, prosecution or penalty in any manner." A.R.S. section 36-2811, subsection B. The AMMA does specify some limits on the possession or use of medical marijuana at certain specified locations. These include use on a school bus, at a preschool or primary or secondary school and in any correctional facility. A.R.S. section 36-2802, subsection B. In 2012, the legislature enacted A.R.S. section 15-108, which prohibits possession or use of marijuana on the campus of any public university, college, community college or postsecondary educational institution. A.R.S. section 15-108, subsection A.

The court concluded that the enactment of A.R.S. section 15-108 was an amendment to the AMMA and, therefore, subject to Proposition 105. The court stated:

By its terms, § 15-108(A) amends the AMMA by adding a location to the AMMA's list of specified locations where the legislature may impose "civil, criminal or other penalties" for a person's possession or use of marijuana otherwise allowed under the AMMA. § 36-2802. Indeed, § 15-108(A) begins by stating that "[i]n addition to the limitations prescribed in" § 36-2802(B), a person "may not lawfully possess or use marijuana on the campus of any public university, college, community college or postsecondary educational institution." Consequently, the legislature amended the AMMA when it enacted § 15-108(A) because that statute makes AMMA-compliant possession or use of marijuana on public college and university campuses criminal.

Maestas, 244 Ariz. at 13, ¶ 16, 417 P.3d at 778.

Under Proposition 202, employers must pay employees at a rate that is not less than the minimum wage. A.R.S. section 23-363. An employee is:

any person who is or was employed by an employer but does not include any person who is employed by a parent or a sibling, or who is employed performing babysitting services in the employer's home on a casual basis.

A.R.S. section 23-362, subsection A.

House Bill 2523 would allow employers to pay certain employees the federal minimum wage, which is significantly less than the minimum wage prescribed in A.R.S. section 23-363. The bill would make an exception to conduct that is required under Proposition 202. Therefore, House Bill 2523 is subject to Proposition 105.

I understand that an argument has been made that House Bill 2523 is not subject to Proposition 105 because it applies to an entirely new class of employees who are employed on a part-time, casual basis. This argument flies in the face of the clear language of the statute. An employee is any person employed by an employer. A part-time, casual employee falls within this broad definition. The statute does except a person employed by a parent or sibling or a babysitter employed in an employer's home "on a casual basis." *Id.* If the drafters of Proposition 202 had intended to exclude other persons employed on a casual basis, they would have included them in this exclusion. Therefore, the persons addressed in House Bill 2523 fall within the meaning of an employee and the minimum wage requirements of the current voter approved law.

Publications of the Industrial Commission of Arizona, the agency that enforces the minimum wage requirements, also indicate that these requirements apply to casual workers. In answering frequently asked questions, the Commission provided:

Does the Arizona minimum wage apply to part-time or temporary employees?

Yes. Arizona's minimum wage laws make no distinction between full-time, part-time, or temporary employees

Industrial Commission of Arizona, *Frequently Asked Questions (FAQS) About Minimum Wage and Earned Paid Sick Time (Rev. February 5, 2018)* at 9 https://www.azica.gov/sites/default/files/media/FREQUENTLY%20ASKED%20QUESTIONS_MasterwTOC%20FINAL%20020518.pdf.

The FAQ also states that the law makes no distinction in the minimum wage requirement between adults and minors. *Id.*, at 10.

CONCLUSION

The voter approved minimum wage requirement applies to all employees except for persons working for a parent or sibling and persons who do in-home babysitting on a casual basis. House Bill 2523 would change this requirement by prescribing an exception for persons who are under twenty-two years of age, employed on a casual basis and enrolled full-time as a student. Because House Bill 2523 would change the application of the minimum wage requirement, the bill is subject to Proposition 105.

cc: Lisette Flores